

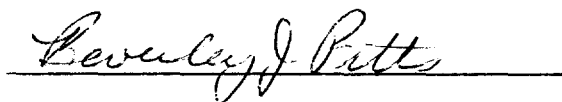
A Reporter's Privilege: A Question of Interpretation

An Honors Thesis (JOURN 499)

by

Diane M. Goudy

Dr. Beverley Pitts

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A reporter's goal is to obtain the truth from his sources so that he can accurately report the news to the public in the stories that he writes. However, because controversy is often at the heart of the story a reporter is writing, sources of information may become scarce -- especially human sources, who for many reasons, may be afraid to reveal the truth because the information they provide may be attributed to them.

Because the stories in which a news reporter must grant confidentiality to sources often are about illegal activities such as organized crime and drug rings, police investigations often result, and eventually, a reporter may be subpoenaed to testify at a trial.

As in some recent cases, reporters have held firm in their refusal to disclose sources of information on the grounds that without such a privilege to withhold this information, sources would dry up, and as a result, reporters would ultimately be unable to keep the public well-informed.

It is absolutely essential that reporters have this privilege so that they can gather information in the best interest of the public. The press has traditionally been viewed as a participant in the checks-and-balances system of the government, as its

nickname, the Fourth Estate implies. Not only does the press play a role of an adversary of the government, but it also serves as a "watchdog" for the people to guard against the abuses of those in power.

Therefore, throughout the last few years, a conflict has arisen between news reporters granting confidentiality to sources and the need of a court to gather information so that a fair trial may be conducted. There has been a documented increase in the number of subpoenas to reporters asking them to reveal both confidential sources of information reported in a story and also for confidential information itself.

This conflict puts the First Amendment and the Sixth Amendments to the U.S. Constitution at odds. For in one is the freedom of the press involving the protection of confidential news sources, but on the other side is the right of an accused person to confront witnesses against him and to find witnesses in his favor. Because both of these amendments carry equal weight and neither is superior to the other, the outcomes of cases tried by the courts are varied and are judged according to the balance of societal issues on an individual basis.

From this framework, a newsman's privilege has been developed in many states. This privilege grants immunity to a newsman when testifying in court, allowing him the right not to divulge confidential sources or confidential information. These privileges, when enacted as law, are referred to as shield laws.

About 26 states have passed shield laws which protect reporters from revealing information and sources consulted in the news-gathering process. Some of these laws are absolute while others are qualified or restrictive, but all have been based on the assumption that if the government can mandate that journalists reveal confidential sources, people who have important information but who fear repercussions from being identified will remain silent, causing a "chilling effect" which ultimately deprives the public of essential information.

Classifying state shield laws as either absolute or qualified has been misleading, for in some instances, laws have been assumed to be absolute by those who drafted them, but the courts have deemed them otherwise. The first shield law was passed by Maryland in 1896. Seven shield laws were legislated in the 1930s, four resulted during the 1940s and four were developed in the 1960s. Nine states -- Delaware, Illinois, Minnesota, Nebraska, New York, North Dakota, Oregon, Rhode Island, and Tennessee -- have adopted shield laws since 1970. (Council of State Governments, 1973) But since the original statutes were passed, many have been amended as court decisions raised additional issues about shield law formulation.

For example, Indiana and New Mexico amended their laws in 1973 to extend the privilege to former reporters because of a court decision which denied privilege to William Farr because he was no longer a reporter. California also amended its privilege law in 1971 to account for that decision. (Council, 1973)

Shield law legislation was introduced in more than half of the state legislatures during 1973, but less than half of the legislation drafted was adopted. (Council, 1973) The increase in investigative reporting contributed to this increase in enacting law of this effect, according to conclusions made by a 1973 study by the Council of State Governments. The U.S. Congress has also considered shield law legislation and held hearings on the topic, although no federal shield law has ever been passed.

Proponents of federal shield law say the commerce clause grants the federal government the power to regulate and protect interstate communications. In addition, many say that uniformity in this type of law is needed to avoid conflicts among state shield laws. Another argument made by those in favor of federal shield laws is that because half of the states have already enacted shield legislation, this serves as evidence for the need of a federal statute.

Some oppose federal shield laws on the basis that the rules of evidence in state courts be regulated under the commerce clause would be unconstitutional. Opponents also contend that it is not appropriate that Congress should use a federal law to dispose of press subpoenas, especially since the Supreme Court held a shield to be a procedural right rather than a fundamental right.

Court cases involving a reporter's right to not reveal confidential sources or confidential information have raised a great many questions including: Whom, exactly, should the

shield law protect? For journalists, whose professional and personal lives are often inseparable, what information is protected and what isn't? and Is the shield law vulnerable to abuse?

Shield laws are often criticized; the laws themselves are not so often the object of this criticism, but more often the interpretations of the laws by the courts. Courts have repeatedly brought to light more loopholes in many of the state statutes.

Because of the uncertainty of the boundaries of shield laws enacted by many states, and also because of the question of whether or not a federal statute is needed to resolve the diversity among the state laws, I will attempt to review the history of the shield laws, review their original intent, and examine their purpose.

I will also review many of the cases in which state shield laws have been put to test, along with the outcomes and the assumptions of judges who heard the cases. I will analyze the strengths and weaknesses of the present legislation, and finally, propose some viable solutions for creating a more standard shield law which could serve as a model for adoption among states, or ultimately, by the federal government.

#### HISTORICAL OVERVIEW

Confidentiality and privileged communication is not a new question of law. As far back as the reign of Queen Elizabeth, the confidential relationship between a lawyer and his client

was recognized and protected by law. (Overbeck, Pullen, 1985) British common law also recognized an equivalent privilege between husband and wife.

Legislation in the United States, following much of the British pattern, has also granted privilege to these relationships. American law has even extended confidential privilege statutes to included relationships such as clergy/parishoner, physician/patient, and informant/government. (Francois. 1978)

The statutory approach to news reporters' privilege has been on a state by state basis rather than on a federal level. Maryland was the first state to pass a reporter's privilege statute in 1896 following an incident involving a Baltimore Sun reporter. (Steigleman, p. 196) The reporter was sent to jail for contempt of a grand jury after the reporter refused to reveal a source of information which allowed him to accurately predict a pending indictment. (Steigleman, p. 196)

Now, more than 91 years later, over one-half of the 50 United States have shield laws. Many of the 26 laws were drafted and enacted in direct response to a U.S. Supreme Court decision handed down in Paul M. Branzburg v. John P. Hayes et al. (1972).

A number of the 26 state shield laws provide journalists a significant amount of legal protection against revealing confidential sources of information and confidential information itself. In most cases, in fact, journalists are relieved from compulsory testimony about a confidential source of information in any legal proceeding.

About half of the shield laws in existence today stipulate a qualified privilege rather than an absolute privilege. This means that the news reporters' privilege is not viewed as superior to other interests but rather that it is balanced with the overriding public interest weighing against the ability to carry out justice.

Varying conditions in each of the 26 shield laws have made it nearly impossible for one to predict its interpretation prior to a test in the judiciary process. For instance, in 1975 New Mexico's state Legislature passed shield legislation, but the law was declared unconstitutional by the state's Supreme Court only a year later in Ammerman v. Hubbard Broadcasting, Inc. (1976). The court ruled that the shield law was an "interference with judicial prerogatives concerning evidence." (Gillmor, Barron, 1984, p. 402) Hence, what may appear as a "strong" shield law or a nearly absolute piece of legislation may be substantially weakened or even obliterated by the courts.

Shield laws have been typically categorized into one of the three following groups: 1) absolute privilege laws, which seemingly excuse a reporter from ever revealing a news source in any type of legal proceeding or inquiry; 2) laws that only apply the privilege if information derived from the source is actually published or broadcast; and 3) qualified or limited privilege laws, which may have one or many exceptions, often allowing the courts to disregard them under certain circumstances. (Overbeck, Pullen, 1985) A few



examples of the varying statutes to illustrate the diversity of the 26 shield laws now in existence:

In the Arkansas shield law, the news reporter's privilege is not absolute. The statute stipulates that the privilege may be revoked if it is demonstrated that the article (written or broadcast) was "written, published or broadcast in bad faith, with malice, and not in the interest of the public welfare." (Gora, 1974, p. 244)

Indiana's code extends the news reporter's privilege to protect "the source of any information procured or obtained in the course of (the reporter's) employment" whether or not it was published or broadcast. This state's privilege also extends specifically to former reporters. (Gora, 1974, p. 245)

The Louisiana statute offers a news reporter's privilege to protect "the identity of any informant or any source of information obtained by (the reporter) from another person while acting as a reporter," except that after a hearing, a court may "find that the disclosure is essential to the public interest." (Gora, 1974, p. 245)

Illinois' privilege also protects a confidential source of information or confidential information obtained by a reporter. However, the law is conditional, stating that a court may divest the reporter of the privilege after consideration of "nature of the proceedings, the merits of the claim of defense, the adequacy of the remedy otherwise available, if any, the relevancy of the source, and the possibility of establishing by other means that which it

alleged the source requested will tend to prove," if the court determines "that all other available sources of information have been exhausted and disclosure of the information sought is essential to the protection of the public interest involved." This law is also extended to anyone who was a reporter at the time the information was sought and obtained. (Gora, 1974, p. 244)

In Delaware, a reporter's privilege protects a source or the content of information a reporter gains within the scope of his professional activities, except that during adjudicative proceedings, a condition is required to allow the information to remain confidential. The first is that the reporter must first state under oath that "the disclosure of the information would violate an express or implied understanding with the source" or would hinder maintenance and development of source relationships. The second stipulation is that the content is no longer privileged "if the judge determines that the public interest in having the reporter's testimony outweighs the public interest in keeping the information confidential. (Gora, 1974, p. 244)

Other state statutes are less complicated. Michigan's shield law states "communications between reporters of newspapers or other publications and their informants are ... privileged and confidential." (Gora, 1974, p. 245)

The excerpts from a few of the 26 state statutes offering some type of reporter's privilege demonstrate the broad range of the kinds of protection given to working journalists.

Many still argue that there is no need for state shield laws because the First Amendment should be interpreted broadly enough to provide an absolute privilege to reporters. However, courts to date have not ruled in favor of this broad-based interpretation. (Paul M. Branzburg v. John P. Hayes et al, 1972)

No federal legislation has been enacted into law although attempts were made following the Supreme Court ruling in the Branzburg case in 1972. However, the Department of Justice has adopted guidelines which define when and how a United States attorney can issue a subpoena against a working reporter. The following is a summary of the federal guidelines (Pember, 1984, p. 305):

"1. The Department of Justice must attempt to strike a balance between the public's interest in the free dissemination of ideas and information and the public interest in effective law enforcement when determining whether to seek a subpoena for a journalist's confidential information.

2. All reasonable attempts should be made to obtain the information from alternative sources before considering issuing a subpoena to a member of the news media.

3. Negotiations with the news media to gain the information which is sought shall be pursued in all cases in which a subpoena to a member of the news media is contemplated.

4. If the negotiations fail (if the reporter won't provide the material voluntarily), the attorney general must approve the subpoena based on the following guidelines:

- a. There must be sufficient evidence of a crime from a non-press source. The department does not approve of using reporters as springboards for investigation.
  - b. The information the reporter has must be essential to a successful investigation -- not peripheral or speculative.
  - c. The government must have unsuccessfully attempted to get the information from an alternative non-press source.
  - d. Great caution must be exercised with respect to subpoenas for unpublished information or where confidentiality is alleged.
  - e. Even subpoenas for published information must be treated with care because reporters have encountered harrassment on the grounds that information collected will be available to the government.
  - f. The subpoena must be directed to specific information."
- (Pember, 1984, p. 305)

So, with this summary it is evident that the federal government does equate some privilege to confidential information obtained by reporters.

Since there is no real consistency between reporters' privilege statutes from one state to another, a review of some legal precedents set through the last few decades is necessary to provide a framework from which an extensive analysis of shield law legislation can be synthesized.

FARR V. SUPERIOR COURT (1971)

This case demonstrates the loopholes in shield laws which can result in serious repercussions for journalists who invoke them to protect their sources. William Farr was a reporter for the Los Angeles Herald-Examiner in 1970 and was assigned to cover the trial of Charles Manson and his followers for the murders of actress Sharon Tate and many others. (Overback, Pullen, 1985) During this trial, a restrictive or gag order was applied so that trial participants were barred from releasing the content of any testimony given.

Although this restrictive order was issued, two of the six attorneys gave Farr a copy of a statement made by a possible witness for the prosecution. The statement detailed that Manson had intended to torture and murder numerous show business celebrities, in addition to containing a confession to some of the crimes that she and the rest of the Manson group were being tried for.

Farr published a story in the Herald-Examiner as a result of the information he received from attorneys, and after the Manson trial was over, the trial judge, Charles Older, called for a special hearing to find out who had leaked the information to Farr. Farr was summoned to divulge the source of the "leaked" statement, but he refused on the basis of the California shield law. At this point in time, Farr's defense appeared to be satisfactory to the judge.

Later on, Judge Older summoned Farr once again to reveal the source of information for his story. At the time of the

second summons, Farr was no longer a reporter for the Herald-Examiner but was now a special investigator for the Los Angeles County District Attorney. Farr again refused to comply with the judge's request, although the judge said that the California shield law protected only currently employed reporters, and because he refused to comply, he was cited for contempt of court.

Following this citation pronounced by the court, the case was complicated even further, with a series of legal tactics which dragged on for more than 10 years. In 1972, a California court of appeals issued a ruling which made an exception to the state's shield law. It stated that the state's shield law was inapplicable to Farr's case because the law would inhibit the court's control of trial participants and hinder the enforcement of its rulings. In fact, it went on to say that the legislature had no business enacting policy which would prohibit a judge's right to seek information. The ruling included the following statement: "To construe the statute as granting immunity to petitioner, Farr, in the face of facts here present would be to countenance an unconstitutional interference by the legislative branch with an inherent and vital power of the court to control its own proceedings and officers." (Pember, 1984, p. 304)

Still facing an indefinite prison sentence for the contempt of court citation, Farr was once again asked to reveal his sources. He again declined to reveal his source of information and went to jail on an indefinite sentence following refusals by both the California and U.S. Supreme Courts to hear the case.

Farr remained incarcerated for a total of 46 days before the California court of appeals judge ended the contempt citation and ordered Farr's release.

There are two interesting sidelights to this case which should be mentioned. During Farr's trial, the courts circumvented the issue of whether the shield law should protect former reporters. Although the courts sidestepped this question, the legislature revised the California shield law to prohibit courts from forcing former reporters to reveal information or confidential sources after they have left their reporting posts.

The second note is that another amendment made to the California shield law by the legislature was added which stops judges from sentencing reporters to indefinite jail sentences.

CALDWELL V. U.S. (1970)

A New York Times reporter, Earl Caldwell was covering a story on the Black Panther activity in San Francisco. Caldwell had gained the confidence of Black Panther members and was allowed into their clubhouse, where he subsequently taped interviews and took notes about Black Panthers. From the information Caldwell gathered, he wrote a series of articles about the Black Panthers organization which then appeared in the Times. (Francois, 1978)

In February of 1970, Caldwell was subpoenaed by a federal grand jury which was investigating the possible criminal activities of the Black Panthers. The subpoena demanded Caldwell's notes and tapes, which Caldwell refused to supply.

The reporter also refused to even appear before the grand jury, contending that his attendance at a secret grand jury session would ruin his reporter-source relationship with Black Panther members.

Caldwell and the Times tried to quash the subpoena, but failed to do so because the summons was modified to a protective order which omitted the request for any unpublished information secured by Caldwell as a professional journalist to be divulged. The modified subpoena greatly reduced the scope of the questioning of Caldwell. The new order specified two protections: 1) the reporter didn't have to offer any information about confidential associations, sources or information he received, and 2) he didn't have to "answer questions concerning statements made to him or information given to him by members of the Black Panthers unless such statements or information were given to him for publication or public disclosure..." (Francois, 1978, p. 329)

Another special privilege granted by the modified subpoena was that Caldwell would have been able to consult with counsel during a grand jury session to ensure that the court order was being followed. The Northern District Court of California judge dismissed the motion to quash the subpoena because of the "shield" granted to Caldwell.

However, Caldwell still refused to obey the order. He was cited for contempt and once again appealed. One of the reasons Caldwell stated for his refusal to testify was that no compelling governmental interest had been shown by the courts that



would deem his testimony essential.

When Caldwell made this second appeal he did it without the formal support of the Times, although the newspaper did continue to pay for his legal fees. The reason the paper backed out of the appeal, according to a memo directed to the staff and written by managing editor A. M. Rosenthal, was that when a reporter will not agree to authenticate his story, the paper had to remove itself from the case or "otherwise some doubt may be cast upon the integrity of Times' news stories." (Francois, 1978, p. 329)

The New York Times, however, viewed the limited protective shield specified for the grand jury investigation as a positive step toward shielding journalists since it extended newsmen's privilege more than any prior court decision. The Times submitted an amicus curiae advocating a qualified rather than absolute privilege for reporters. The brief took into consideration a balance between the government's right to be informed versus a reporter's right to gather news. On November 16, 1970, however the tide seemed to turn in the favor of Caldwell when the Ninth Circuit Court of Appeals reversed the lower court decision. In an opinion written by Judge Charles Merrill, the following statements were made in defense of shielding a reporter:

The case is one of first impression and one in which the news media have shown great interest and have accordingly favored us with briefs as amici curiae. ... The need for an untrammelled press takes on special urgency in times of widespread protest and dissent. In such times the First Amendment protections exist to maintain communication with dissenting groups and to

provide the public with a wide range of information about the nature of protest and heterodoxy. ... (Francois, 1978, p. 330)

After reviewing the powers of grand juries, the judge stipulated new reasoning:

... Where it has been shown the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret grand jury interrogation, the Government must respond by demonstrating a compelling need for the witness's presence before a judicial process properly can issue to require attendance. We go no further than to announce this general rule. ... Finally we wish to emphasize what must already be clear: the rule of this case is a narrow one. It is not every news source that is as sensitive as the Black Panther Party has been shown to be respecting the performance of the "establishment" press or the extent to which that performance is open to view. It is not every reporter who so uniquely enjoys the trust and confidence of his sensitive news sources. (Francois, 1978, p. 330)

Although the application of this precedent was narrow and details of how the government would go about showing compelling need for a reporter's testimony were absent from the opinion, the Fourth Estate believed it had won a victory. However, the battle in this case was not over. The government appealed to the U.S. Supreme Court. The court decided the Caldwell cases would be joined with the Branzburg and Pappas cases, which are reviewed below. The resolution of these cases follows in the next sections.

#### THE TWO BRANZBURG CASES

Paul Branzburg, a reporter for the Louisville Courier-Journal, wrote a story about two unidentified people who were synthesizing hashish from marijuana in Jefferson County,

Kentucky. The story was published November 15, 1969. (Gillmor, Barron, 1984)

Branzburg was subpoenaed by a grand jury which requested the disclosure of the identity of the two people he had witnessed making the hashish, even though the article reported that Branzburg had promised he wouldn't reveal the source's names. The reporter refused to appear before the grand jury, and he justified his refusal stating that he was invoking the Kentucky shield law. At the time that Branzburg's case went to trial, Branzburg v. Judge Hayes, it was believed that Kentucky's law was an absolute privilege for news reporters. But the outcome of this court decision dispelled that belief.

The trial court issued a decision stating in effect that the state's shield law protected Branzburg's sources of information but not the information which he had received. In other words, Branzburg would still be required to testify about what he had observed personally -- including the identity of the two people he had observed. This interpretation, then, made an important distinction between a reporter merely observing sources and a reporter who received information from sources. It assumes that to protect the identity of his sources, a Kentucky reporter must obtain information from a source in addition to merely observing a source's behavior.

After publication of a story about illegal drug users in Frankfort, Kentucky, which appeared on January 10, 1971, Branzburg once again found himself the subject of a grand jury subpoena. He had reported information he obtained from two weeks of interviews with several drug users, and the

Franklin County grand jury demanded that Branzburg reveal the identities of the drug users he had spoken with. The reporter again refused to oblige the grand jury with the information it sought from him. His argument to have the subpoena quashed claimed requiring him to testify would be an "incursion upon First Amendment freedoms in the absence of compelling Commonwealth interest..." (Francois, 1978, p. 331) He supplemented his argument by also claiming that he shouldn't have to appear before the secret grand jury since he "is required to go behind the closed doors of the grand jury room, his effectiveness as a reporter in these areas (use and sale of illegal drugs) is totally destroyed." (Francois, 1978, p. 331)

Similar to the protective order issued in the Caldwell case, Branzburg was ordered to answer questions posed by the grand jury about any criminal activity he observed, but it did protect him from revealing his confidential sources of information. The Kentucky Court of Appeals had again grounded its interpretation of the state's shield law which in effect rejected any First Amendment privilege to reporters.

Branzburg appealed to the U.S. Supreme Court. A ruling on these cases was issued by the nation's highest court after the Branzburg suits were coupled with two following shield law cases. The verdict is included in the subsection "Trilogy of Cases Resolved."

IN THE MATTER OF PAUL PAPPAS

As in the case of Earl Caldwell, the Pappas case centered around a story about Black Panther activity. Pappas was a television newsman for a New Bedford, Mass., television station. On July 30, 1970, Pappas was assigned to cover civil disorders in New Bedford. In that city, Pappas was allowed to enter a Black Panther headquarters on the condition that he not reveal anything he saw or heard except for an anticipated raid on the headquarters by police. While inside, Pappas did photograph a Black Panther leader reading a prepared statement. However, no police raid on the headquarters ever occurred. (Council, 1973)

Following his entry into the headquarters, a Bristol County, Mass., grand jury subpoenaed him to testify. Pappas did appear before the grand jury and answered questions about events which occurred outside the headquarters, but when asked about activities inside the Black Panthers headquarters, he refused to testify saying the information was confidential and using the First Amendment as his privilege because Massachusetts had no shield legislation.

The court struck down his First Amendment defense, and he was subpoenaed by the grand jury again, but this time he refused to appear, and the court judge ruled Pappas had to testify or face a contempt citation. Pappas appealed to the state's Supreme Judicial Court, which upheld the lower court's ruling and said the public "has a right to every man's evidence except in "exceptional circumstances." (Gillmor, Barron, 1984)

Another important note in this court's ruling is that it rejected altogether the U.S. Circuit Court's ruling in the Caldwell case, saying that a newsman is like any other citizen and has no special privilege protecting him from an obligation to answer inquiries made by a grand jury or court order.

This case was resolved in 1972, along with the Caldwell and Branzburg cases, in a U.S. Supreme Court decision, which is detailed in the following pages.

#### TRILOGY OF CASES RESOLVED

The Caldwell, Branzburg, and Pappas cases were decided by the U.S. Supreme Court in Paul M. Branzburg v. John P. Hayes et al. (1972). This decision was the first issued by the Supreme Court on the claim of reporters to a constitutional privilege against revealing confidential sources of information or confidential information itself. The reporters lost their battle.

The nation's highest court ruled, in a 5-4 decision, that reporters were not exempted from the normal duty of appearing before a grand jury to answer questions relevant to a criminal investigation. In other words, the freedom of the press isn't infringed upon when reporters are called to testify before state and federal grand juries.

#### In re VAN NESS (1982)

This case is of particular interest because it defined the boundaries of California's state shield law in application

to freelance writers. The California Superior Court issued a ruling stating that the shield law doesn't apply to those freelancers who have not yet made a contractual agreement with a publication or organization protected by the law. In other words, freelancers who pursue information for a story not yet sold to a publication or organization before the reporter begins the news-gathering process is susceptible to inquiry. So, only those reporters who have sold a story to a publication or news organization prior to gathering the information for it are protected from subpoenas ordering them to reveal their sources. (Pember, 1984)

GARLAND v. TORRE (1958)

Reporters' privilege has also been questioned in libel cases. In the mid-1950's, actress Judy Garland brought a libel suit against CBS because of comments in a column by Marie Torre which was published in the New York Herald-Tribune.

Miss Torre, in "TV-Radio Today," attributed certain statements to an unnamed executive from CBS. Garland's attorney took a deposition from Torre, at which time Torre refused to identify the unnamed source, contending that revealing her source would violate a confidence.

During the U.S. District Court hearing, she continued to refuse to reveal the identity of her source and was held in contempt of court. She was sentenced to 10 days in jail, but was released on her own recognizance pending an appeal. Torre based her claim on the First Amendment, which was the first time the First Amendment had been claimed as a shield of

protection. Prior to this case, journalists used common law as grounds for their defense.

In 1958, the Second Court of Appeals heard the case and agreed with Torre's attorney that forced disclosure of Torre's source might abridge press freedom by imposing some limitation upon the availability of the news. However, the court justice said that the freedom of the press was not absolute and must be balanced. He argued that freedom of the press is basic to a free society but courts armed with the power to discover the truth are also basic to free society.

He also brought up the concept that it is the duty of a witness to testify and that this concept has deep roots in history just as does the freedom of the press. The obligation of a witness to testify and the additional right of a litigant to obtain judicial compulsion of testimony without question could impinge upon First Amendment freedoms. Therefore, the judge concluded that the court would not hesitate to rule that the freedom of the press "must give place under the Constitution to a paramount public interest in the fair administration of justice." (Francois, 1978, p. 328)

Since the questions the court wanted Torre to answer were determined to be relevant in the matter of the suit, the judge ruled that Torre had no right to refuse to answer, although the columnist continued to do so. The U.S. Supreme Court decided not to hear the case, so Torre was incarcerated for a period of 10 days.

It is interesting to note that in this case the judge did say that if the news source was of doubtful relevance to the



case or if an attempt was being made to require many disclosures of a newspaper's confidential sources, that he would have considered a different ruling.

CAREY v. BRITT HUME (1974)

The decision in this case ruled against a First Amendment privilege to shield a confidential source following the filing of a libel suit.

The suit was decided upon in 1974 and the three-judge court took into consideration the Supreme Court opinions given in Times-Sullivan, Branzburg and the circuit court decision in the Garland case in 1958. The decision yielded the conclusion by the court that a newsman must divulge a confidential source in certain circumstances. (Francois, 1978)

The action arose from a story by Britt Hume, who was a reporter for columnist Jack Anderson. The story reported that plaintiff Edward L. Carey had removed some documents from his United Mine Workers of America office supposedly to frustrate a government probe into UMW finances. According to the story, the plaintiff then complained to police that a box which was supposed to have contained the documents had been stolen by a burglar.

Carey filed a lawsuit alleging he had been libeled by the story. Hume claimed the information for the story had been obtained from eyewitness observations by Casey's co-workers. However, Hume refused to reveal the identity of his sources. With these facts, the case was sent to the U.S. Court of Appeals.

The judge in the case cited the Garland case, noting that the court had balanced the freedom of the press against a paramount public interest in the fair administration of justice. The judge went on to say that the Supreme Court continues to cite Garland, which strongly implies that it has a continuing relevance and negates the inference that the Court does not consider a defamed person's interests as important.

Therefore, the court ruled that the news reporter must reveal the names of sources who supplied information on which the allegedly defamatory story was based where the plaintiff had no other reasonable means of finding out who the sources were and where identification was crucial to deciding the fate of the case. The judge also added that identification of sources is especially essential if plaintiffs are to overcome the "actual malice" hurdle imposed by the Supreme Court as protection for the news media.

CALIFORNIA v. LUCAS (1986)

This case is a recent example of how a judge can devise his own course of action to determine shield law protection. In California, a San Diego Superior Court judge dropped a contempt citation held against KGTV news staff in November of 1986 after using an unusual approach to determine his ruling.

The judge chose to interview the TV journalists in his chambers and after interviewing them, he concluded that the journalists possessed no confidential information which would be useful to the defendant in an attempted murder case.

J.W. August, a KGTV assignment editor, and reporter Steve Fiorina were subpoenaed after the defendant in the case, David Allen Lucas, was indicted for stabbing a Seattle woman in January 1986. Lucas had Fiorina and August subpoenaed because he sought information the station had gathered in attempting to find out the identity of an anonymous caller who had tipped off the reporters to the "murderer's" address. ("Contempt Against TV Newsmen Lifted," 1987)

The two journalists refused to answer some questions they were asked during a preliminary hearing in February 1986, and for that reason, the San Diego Superior Court judge who presided over the hearing cited the journalists for contempt of court. In the ruling, the judge said Lucas' Sixth Amendment right to confront all witnesses against him outweighed the journalists' right under the California shield law to withhold confidential information which had been unpublished.

The reporters were not sentenced, however, because the judge delayed the procedure until the two appealed.

A ruling from the San Diego Court of Appeals echoed that of the lower court's ruling. The court concluded that the material sought by the defendant was not protected by California's shield legislation because it would not disclose source names or unpublished information. The court also said its decision to rule against the journalists was reinforced because it decided that August might not have been acting in his professional capacity of a journalist when he gathered

the information in question.

According to the court, "No authority under the shield law protects a journalist's activities as either a citizen/informant or a private investigator acting to assist law enforcement." ("Contempt, 1987, p. 19)

After staying the order for a few weeks, the California Supreme Court turned the case back over to the trial court where the suit originated. The following November, upon a request by the two journalists, a judge interviewed them privately in his chambers -- without attorneys for either side in attendance.

The judge agreed that the interview "would not constitute a waiver of protection" under the California shield law, which guards reporters from being forced to reveal confidential sources.

Following the interview, the judge decided that the two reporters didn't have any information which could have strengthened Lucas' defense. The judge also denied a request by the defense to review the transcript of the reporters' private hearing with the judge, saying that the transcript would remain sealed. However, if the case is appealed, the transcript will be available to the appellate court.

#### THE AVILA CASE (1985)

This case involves the publisher of a weekly Spanish-language newspaper in Union City, N.J., and how he used the state's shield law to protect him from testifying before a grand jury. (Garneau, 1986)

In 1985 the Hudson County, N.J., prosecutor announced an investigation into allegations that organized crime held a firm grip on the local Union City government. A grand jury convened by the prosecutor began to investigate the accusations and also check into rumors that organized crime was trying to have the city's police chief removed from office. It was through this part of the grand jury's investigation that it began to look into the role of publisher Rene Avila's Spanish-language newspaper -- Avance -- in connection with organized crime and Avila's relationship with an alleged Cuban organized crime figure.

The grand jury wanted to question Avila about his personal relationship with a reputed leader of Cuban organized crime and another Cuban, who was well known as a gambling operator. Through court-ordered wire taps, the grand jury learned that Avila helped the cause of the Cuban godfather, and the grand jury decided to subpoena him to testify about his relationship.

However, Avila invoked the New Jersey shield law and the First Amendment. He also tried unsuccessfully to quash the subpoena. Citing the shield law after Avila was ordered to appear before the grand jury, he refused to answer questions and even refused to identify his own voice on tape.

Avila's argument included that he could use the shield law as his defense for not answering questions about his relationship with members of organized crime because he is a journalist 24 hours a day. For that reason, his defense concluded that the shield law not only protects the sources of

his stories but also all of his social relationships.

The New Jersey shield law permits reporters to refuse to divulge a "source, author, means, agency or person from or through whom any information" was gained or any "news or information obtained in the course of pursuing his professional activities whether or not it is disseminated." (Consoli, 1986) And although no confidential sources were involved in the Avila case, the publisher was able to invoke the shield law as adequate protection from testifying about his personal life.

The grand jury finally allowed Avila to not testify since he wasn't the one targeted in the grand jury investigation and was never charged with any illegal activity. The grand jury also expressed its concern about the close ties between publisher Avila and organized crime and called for the Legislature's close scrutiny of the state's shield law, which was once considered to be one of the strongest in the nation.

The appeals court decision in this case also set an interesting precedent in that it extended the state's shield law to another group of publications -- free-circulation papers, which had not formerly been protected because they didn't meet the legislative definition of newspapers.

#### STATE RULINGS

Although most rulings in shield law cases have been issued by federal courts, at least seven state supreme courts have granted journalists a qualified privilege even though no statutory shield law existed in the state in which the cases

were tried. (Overbeck, Pullen, 1985)

In 1977 the Iowa Supreme Court recognized a qualified First Amendment privilege for news reporters in Winegard v. Oxberger. Although the libel case resulting from several stories about a long divorce proceeding didn't turn out to be a victory for the press, the court basically adhered to the three-part test suggested by judges who wrote the dissenting opinion in the Branzburg case. The suggested test provides that a reporter can refuse to divulge confidential information in a civil matter unless: 1) the information in question "goes to the heart of the matter" of the suit; 2) other reasonable ways of gathering the information in question have been exhausted; and 3) the lawsuit involved isn't determined to be patently frivolous. (Overbeck, Pullen, 1985) In the end, the Iowa Supreme Court decided that the three-part test had been met, so the reporter was ordered to reveal her sources.

States other than Iowa have also recognized at least a qualified Constitutional privilege for reporters, and some state courts have even determined that reporters' privilege is to some degree inherent in their own state constitutions. One example of this type of ruling exists in a case decided by the Wisconsin Supreme Court, Zelenka v. Wisconsin (1978). This case resulted from a drug-related murder in which the defendant wanted to find out the identity of a source for an underground newspaper reporter's story. In the story, the anonymous source said the victim had been cooperating with narcotics officers.

In its decision the court did say that a journalist's right to withhold confidential sources of information had to be weighed against the defendant's need for information to defend himself. However, the state supreme court ruled that the defendant had not shown that the identity of the source would have strengthened his defense, so the court upheld the reporter's contention that the source's identity should remain confidential. (Overbeck, Pullen, 1985)

In New Hampshire, another case also resulted in a similar ruling. The murder case, New Hampshire v. Siel (1982), occurred after two University of New Hampshire student journalists wouldn't turn over to the court documents revealing sources for their story about the victim's alleged involvement in drug dealing. The New Hampshire Supreme Court upheld a lower court ruling that identifying the sources for the story wouldn't have altered the judge's ruling.

However, some state supreme courts have been adamantly opposed to granting any First Amendment privilege to reporters. For example, the Idaho Supreme Court refused to recognize a First Amendment privilege for journalists in Caldero v. Tribune Publishing (1977), a civil libel suit. The suit was brought after a newspaper criticized a police officer for shooting a suspect running from the scene of a minor crime. The defendant, Michael Caldero, wanted the identity of a source for the newspaper's story during pretrial discovery, but the newspaper refused to supply it. The state's supreme court upheld a lower court's contempt citation against the reporter.



The Caldero suit was noted for the language in the ruling which, in effect, condemned granting a privilege to reporters.

It stated in part:

In a society so organized as ours, the public must know the truth in order to make value judgments, not the least of which regard its government and officialdom. The only reliable source of that truth is a press ... which is free to publish that truth without government censorship. We cannot accept the premise that the public's right to know is somehow enhanced by prohibiting the disclosure of truth in the courts of the public. (Overbeck, Pullen, 1985, p. 213)

## ANALYSIS AND CONCLUSIONS

The freedom of the press would be extensively compromised if it did not include the right to gather information in order to disseminate it. Therefore, there must be an inherent right to a confidential communication network between a reporter and his sources implied in the Constitution's First Amendment.

I believe that a reporter has a constitutional right to a confidential relationship with a source resulting from an underlying premise that society has a broad interest in the full and free flow of information to the public. And, in addition, choice based on the wealth of information available to well-informed citizens is one of the most prized ideals of democratic society; therefore, a free press becomes an integral part of the survival of a free society.

I, along with many of the proponents for protective measure inherent in the First Amendment, wish ultimately that no legislation outside of the First Amendment be necessary to shield reporters from disclosing confidential sources and confidential information. However, in light of court rulings on the issue, I do not see that viewpoint as plausible or realistic any longer. The Caldwell case proved that the free press clause in the First Amendment doesn't guarantee immunity for members of the press who receive information from sources in confidence.

In fact, in the majority opinion written by Justice Byron R. White in the Caldwell case (Paul M. Branzburg v. Judge Hayes), the court implied that it might impose more restrictions

on the press in future decisions by claiming that reporters have no privilege different than those "of all other citizens." (Brenner, Rivers, 1982, p. 65)

We see no reason to hold that these reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations ... Newsmen have no constitutional right of access to the scenes of crimes or disasters when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. (Brenner, Rivers, 1982, p. 65-66)

Thus, because the Supreme Court has ruled against a First Amendment privilege for reporters, I believe a federal statute protecting reporters from revealing confidential sources and confidential information should be added to federal law books.

In 1972, following the ruling in the Branzburg case, congressmen introduced 28 bills which drafted at least a qualified privilege to news reporters, and in 1973, another 24 bills of this type were introduced. However, because of the diversity of the bills drafted by a myriad of media and journalistic organizations, no federal legislation was ever passed.

The bills considered, which ranged from those providing a qualified privilege to those which offered an absolute privilege, brought up the same questions which have plagued every person who has tried to formulate a shield law which would provide maximum protection while guarding against

potential abuse.

Perhaps the first determination in formulating a federal shield law is deciding who, exactly should be granted a shield privilege that allows complete protection for a source and the confidential information provided by that source. Many state shield laws grant that privilege to newspaper reporters, along with radio and television journalists. Some of the proposed federal legislation extends the protection more generally to people directly engaged in the gathering of news, and some are so general as to include any person who gathers information for dissemination to the public. (Brenner, Rivers, 1982, p.68)

There is a danger with such a broad definition because it would not include underground newspaper personnel, freelance news writers, lecturers and book authors alone, but it would provide protection for any person who had an interest in public affairs and would give much room for abuse by individuals.

The Avila case is a strong example of this potential for abuse. Rene Avila claimed and received protection under the New Jersey shield law although Avila had close ties with a Mafia ring leader. And although Avila's connections with the Cuban organized crime leader stemmed from a social rather than a professional relationship, he was shielded from testifying before a grand jury because his lawyer argued successfully that since Avila was a journalist 24 hours a day, all his relationships were protected.

Although the law must be strict enough to guard against abuse, it must be open enough to protect freelance journalists.

However, I would suggest that a privilege for freelance journalists be qualified with a clause requiring they be non-fiction writers who must have previously published with recognized news organizations. This type of a clause is necessary to prevent situations such as the Van Ness case, in which a freelance reporter was denied a reporter's privilege because he had no contractual agreement prior to gathering information sought in the case.

Therefore, I would advocate a more strict definition of who should be covered by a shield law by limiting protection to those news gatherers affiliated with legitimate news organizations which are recognized by the public. A bill drafted in this manner should specifically outline what legitimate news organizations are, but it should also definitely make specific reference to shielding the minority press, the underground press, the student press, and independent non-fiction freelance writers who have published work prior to the story in question.

In addition, the law should be drafted with a clause limiting a journalist's protection to include allowing an invocation of the shield law only when a reporter is acting in his capacity as a journalist. I would word the law no more specific than that because a judge would have to make a final determination on the circumstances under which a journalists obtained confidential information; however, this mild stipulation would weaken the potential for the abuse evident in the Avila case.

There is another issue to be addressed within the question of who should be able to claim shield law protection. I think it is essential that a shield law include a provision to protect former reporters who are called to reveal a confidential source or confidential information obtained while they were employed as a reporter.

The William Farr decision is an example of the need for this type of clause within a shield law. In the Farr case, the Los Angeles District Attorney argued that Farr should not be able to claim shield law protection because he was no longer employed as a reporter. For that reason, Farr was held in contempt of court and spent 46 days in prison -- not a just punishment for a reporter who was protecting his confidential source of information.

The second major decision to be made in formulating a shield law is outlining what information should be protected by such a statute. Some state shield laws provide protection for confidential sources only. This protection is far too limited in that it gives no protection to confidential information either published or unpublished, and it also is too limited because a confidential source might be identified if the information revealed is known only to one specific person.

A good shield law must not only protect confidential sources of information but also the information itself whether it has been published or has remained unpublished. The necessity of having sources of published information absolutely shielded

is evident from the Farr and Caldwell cases. Both reporters had been ordered to reveal sources of unpublished information, and both adamantly refused, and both were cited for contempt of court.

Confidential sources of unpublished information also must be protected. Television reporter Paul Pappas was ordered to reveal what he had witnessed inside a Black Panther headquarters although he never wrote a story on it but had only been allowed inside on the condition that the events he witnessed remain confidential.

Another case which displays the precarious position of reporters held in contempt of court for refusing to reveal confidential information in a criminal trial is the Lucas case. In this case, the reporters finally revealed confidential information in a private hearing with the judge only so that the contempt citation, levied against them as a method of coercion, would be dropped. Reporters, when they offer confidentiality to a source, they offer it absolutely; therefore, I don't think the reporters should have violated their confidence. However, this is a prime example of the reason reporters should be granted privilege in criminal proceedings because the judge in this case determined that they had no information which would have helped the accused man strengthen his defense.

Although not as essential as protecting sources of published and unpublished information, I would also recommend a clause in a shield law which would also protect published and unpublished information which wasn't obtained through

confidential communications. The reason I suggest this additional shield, which could be qualified, is that government officials could force the media to release photographs or film outtakes which could implicate individuals who participate in dissident political demonstrations or riots. The qualified privilege could be stipulated by the government having to prove that it has a compelling need for the non-confidential information it seeks.

The third aspect of a shield law which needs to be examined when developing an ultimate form of legislation is which legal actions should be covered by shield laws. Some would have a shield law protect reporters only in federal criminal court proceedings; however this fails to protect reporters who are subpoenaed to testify before a grand jury, and it also fails to include trial courts at a lower level. If reporters are protected only during trial proceedings, they could still be ordered to divulge confidential information by a state or federal grand jury or any other legislative or executive body which has the power to issue contempt citations.

The original conflict about being forced to reveal information began with federal grand juries as is evident in the Caldwell case, but it spread quickly to state grand juries with the Pappas and Branzburg cases, both of which resulted in contempt citations for the reporters involved.

At first, a proposed federal shield law might seem extremely unfair because it allows a reporter to exercise



a privilege not available to ordinary citizens. However, clergy attorneys and psychiatrists have special privileges in that they cannot be forced to divulge any information given them in confidence by their parishoners, clients and patients -- even if the information relates directly to a criminal activity including murder. Therefore, it is imperative that reporters should be able to invoke a shield law during any state or federal legislative, judicial, or executive agency to protect the sources and information which he has promised will remain confidential.

The fourth aspect of shield law formulation should include privilege in libel suits. Because of the nature of libel cases, I believe a reporter's privilege in libel suits must be qualified. And as a guide to determine whether or not a reporter should be granted privilege in a libel proceeding, or even in a criminal investigation where the reporter is an eyewitness to a crime, I propose a three-part test offered by the judges who wrote the dissenting opinion in the Branzburg case. In this test, it is qualified that a reporter will not be ordered to reveal confidential sources or confidential information in any civil matter unless: first of all, the information in question directly relates to the heart of the suit; secondly, that all other possible ways of gathering the information sought have been exhausted; and lastly, that the lawsuit isn't determined by the court to be frivolous. (Overbeck, Pullen, 1985)

Through this type of a test, cases such as Garland and Britt Hume probably wouldn't end up a victory for the press, however, the clause should also include that a journalist cannot be jailed for refusing to reveal confidential sources.

An alternative might be to have a source sign an affidavit swearing to the truth of the information he has provided which would remain sealed in the hands of the reporter unless a libel suit resulted. There is much division among journalists about this option, but it would deter sources from providing a journalist with false, libelous information about a person.

Finally, and definitely a most important consideration when proposing whether or not to legislate a federal shield for reporters, if governmental officials and those in political office hold an unchecked power to compel reporters to reveal a confidential source or confidential information offered by a source under that condition, sources will undoubtedly not be willing to trust reporters any longer. Subsequently, reporters then will be deterred by the threat of officials to cite them for contempt of court and possibly incarcerate them, and furthermore, they will no longer seek and publish important information gathered from confidential sources. This will ultimately lead to a self-censored press.

Therefore, when neither reporters or sources can rely on a shield of confidentiality, valuable information will not be published, and the ability of a democratic society to make well-informed, responsible decisions will be irreparably impaired.

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